Filed 2/4/19 P. v. Burton CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARIO ANDRE BURTON, Defendant and Appellant.	D074584 (Super. Ct. No. RIF1604512)

APPEAL from a judgment of the Superior Court of Riverside County, John D. Molloy, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Allison Acosta, and Felicity Senoski, Deputy Attorneys General for Plaintiff and Respondent.

A restaurant owner asked Burton, who was homeless, to leave the premises. In the altercation that followed, Burton stabbed the owner with a pocketknife. The owner

subsequently suffered cardiac arrest and was rendered comatose. A jury convicted Burton of attempted voluntary manslaughter and assault and found true the allegations that Burton personally used a knife and personally caused great bodily injury. The trial court sentenced Burton to prison for a term of 14 years, six months.

On appeal, Burton contends the admission of evidence related to prior acts of misconduct under Evidence Code section 1101, subdivision (b) (section 1101(b)) constituted prejudicial error. We reject this contention and affirm the judgment.

BACKGROUND

A. *Charges*

Burton was charged with attempted murder (count 1, Pen. Code, §§ 664 & 187, subd. (a)) and assault with a deadly weapon, a knife (count 2, Pen. Code, § 245, subd. (a)(1)). The information alleged as to both counts that Burton inflicted great bodily injury within the meaning of Penal Code section 12022.7, subdivision (b), and with respect to count 1, that Burton personally used a knife within the meaning of Penal Code sections 1192.7, subdivision (c)(23) and 12022, subdivision (b). The information further alleged that Burton had prior convictions for second degree burglary in 2008, grand theft in 2011, and assault with a deadly weapon with force likely to produce great bodily injury in 2014, for which he served prison terms that came within the meaning of Penal Code section 667.5, subdivision (b).

B. *Pretrial Motions in Limine Regarding Section 1101(b) Evidence*

Prior to trial, the prosecution moved to introduce evidence of eight incidents of prior misconduct that the prosecution claimed were relevant and probative of Burton's

intent and motive when he stabbed the victim, Mohamed E., and thus admissible under section 1101(b). The trial court indicated it would allow evidence related to five prior alleged incidents: (1) on August 19, 2013, Burton chased a man because he felt disrespected; (2) on January 22, 2014, Burton pushed a woman after an argument; (3) on March 14, 2014, Burton hit a victim with a two-by-four during an argument; (4) on June 25, 2015, Burton threatened a victim with a blade after a previous argument; and (5) on June 7, 2016, Burton brandished a screwdriver and committed acts of vandalism when a property owner asked him to leave.

The trial court ruled that evidence of prior misconduct would be admitted for purposes of establishing motive only; however, evidence of the June 25, 2015 incident would be admitted for purposes of establishing motive and intent. The following day, after additional argument on this issue, the court confirmed its ruling, and explained as follows:

> "So in the instant case, the ultimate fact here is, really, I'm not sure going to be any one of the elements of the crimes. The ultimate fact for the jury—if I understand how the case is being framed, from the prosecution's perspective, it is framed as [Mohamed] went outside and asked the gentleman to leave and got attacked. From Mr. Burton's position, [Mohamed] came out and started beating me with a belt and I defended myself. Probably over-simplified, but a fair enough shorthand to what the dispute is.
>
> [¶] . . . [¶]
>
> "Given that—given that, what is crucial is what sets the physicality of this dispute off. How does the physicality of this dispute start? It is relevant that, in the past, when the gentleman has been confronted in the way that it is suggested he was confronted here, he has responded violently. He is motivated by a need for retribution when he is disrespected or questioned.

> "I have limited the numbers and I have limited the events to ones that look . . . something like what was going on. There were some other violent offenses that, at the end of the day, just didn't look like they were the same type of thing, and I don't remember which ones were which.
>
> "But I'm also mindful that the [Supreme Court] discusses [in *People v. Thompson* (2016) 1 Cal.5th 1043 (*Thompson*)], when they discuss motive at [p]age [1114] to [p]age [1115], Justice Werdegar says the following: 'Although motive is not an element of either of the charged offenses,' and it's not here, 'it was an intermediate fact that was probative of the defendant's intent and the intermediate fact of motive may be established by evidence of prior dissimilar crimes.' "

The trial court also addressed the issue of impeachment, not limited to the prior acts proffered by the prosecution under section 1101(b). After some discussion of which prior acts involved misdemeanors or felonies, which ones resulted in conviction, and which ones involved moral turpitude, the trial court allowed evidence of eight crimes. Specifically, the court ruled the following crimes could be used for impeachment purposes: (1) a 2008 burglary (felony, Pen. Code, § 459); (2) a 2009 domestic violence offense (misdemeanor, Pen. Code, § 243, subd. (e)(1)); (3) a 2011 grand theft (felony, Pen. Code, § 487, subd. (a)); (4) a 2012 domestic violence offense (misdemeanor, Pen. Code, § 243, subd. (e)(1)); (5) a 2013 grand theft (felony, Pen. Code, § 487, subd. (a)); (6) a 2013 larceny (felony, Pen. Code, § 484, subd. (a)); (7) a 2014 burglary (felony, Pen. Code, § 459); and (8) a 2014 assault (felony, Pen. Code, § 245, subd. (a)(4)).[1]

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1 When discussing the section 1101(b) evidence, the trial court allowed two of the five prior crimes to be used for impeachment (the 2014 two-by-four incident and the 2015 bar fight incident).

The trial court directed the defense to prepare limiting instructions to be read for the jury after the presentation of this evidence.

C. *Trial*

The case proceeded to trial, where evidence was adduced regarding the charged offense and the five prior incidents.

1. *Evidence of the Charged Offense*

On September 8, 2016, between 4:00 and 5:00 p.m., officers from the Riverside Police Department were dispatched to a retail store in response to a call concerning an individual who would not leave the premises. Upon arrival, officers saw Burton just outside the business at the front doors with "a bunch of property kind of laid out in front," blocking the pathway for customers to enter and exit. He was wearing pants but no shirt. One officer performed a "pat-down search" to determine if Burton had weapons or contraband and found a small black pocketknife in Burton's pocket, which he set aside, out of Burton's reach. He asked Burton to leave the premises. Burton "seemed very agitated and frustrated" with the officer. Although he complied with the officer's requests, he seemed "upset" at the overall situation. As he left, he picked up his pocketknife.

Restaurant employee Francisco R. began his shift at 6:00 p.m. that evening, at a restaurant located within walking distance from the retail store. When he arrived at work, he noticed Burton sitting on the restaurant patio drinking beer. Burton was not eating food, and the restaurant did not sell beer. Shortly afterward, Francisco's boss Mohamed—the restaurant owner—arrived and greeted Francisco and his coworker,

Maricila H. When Francisco went to clean a table, he noticed that Mohamed was outside on the patio, talking to Burton. The men were standing up, "face to face," as if they were going to start hitting each other. Francisco did not see Mohamed hit Burton; however, Mohamed had his belt "kind of rolled up in his hand." Within seconds, Francisco went outside to see what was happening.[2] As he was walking out, he saw Burton "pull[] out a knife and poke[] [Mohamed]."[3] Burton pulled the knife from his front right pocket, unfolded it, and stabbed Mohamed using his right hand. Francisco told Burton, "Get the fuck out of here," and at that moment, grabbed Mohamed to pull him inside and started calling the police. Mohamed told Francisco to call the police, which Francisco was already doing. Francisco left Mohamed standing in the store and followed Burton as he left, walking fast, pushing a shopping cart. Francisco, meanwhile, was talking to the police. The prosecution played a recording of Francisco's 911 call.

Maricila had seen Burton sitting outside on the patio earlier when she was on her break. Later, she was in the kitchen when she heard noises. She exited the kitchen and saw Mohamed standing in front of the door, his body bloody. He told her to call his wife, and Maricila ran for the phone. Upon returning, Mohamed was still standing in front of the door. He tried to sit down, but he fell backward. She tried to apply pressure to the

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2 An officer testified that, on the day of the incident, Francisco told him he was already out the door when he saw Mohamed removing his belt and right after that, he saw Burton pull out the knife.

3 At trial, with the assistance of a certified Spanish interpreter, Francisco explained that he used the word "poke" because he did not know the English word for stabbing.

wound in his abdomen. He was having trouble breathing and keeping his eyes open. He told her he was dying.

Sisters Darlene E. and Deborah M. were eating next door and witnessed the altercation on the patio through a window. Deborah, who was sitting facing the window, testified she saw Burton on the restaurant patio and he appeared to be asking passers-by for money. She noticed a restaurant employee "pop his head out" the door, appearing to speak to Burton. Moments later, she saw two people emerge from the restaurant. They appeared to be calmly talking to Burton, who rose from his table and became agitated. He approached the employees, waving his hands in an agitated state. Burton continued to approach them as they backed up, then began making punching motions toward the other men. Burton fumbled with both hands in his pocket. When he pulled his hands out, he had his hand in "a balled fist."[4] Deborah then saw the younger employee pull out a belt, which he swung at least three times, but Burton continued to approach, "swiping" or "jabbing" toward the restaurant employees. She saw Burton "swiping at" or "jabbing at" the older employee, who then put his arms to his chest.[5] The employees retreated into the restaurant while Burton backed away and left the premises, walking briskly. As she watched the events unfold, Deborah telephoned 911, hoping to obtain help for the

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[4] Deborah never saw a weapon, just "a balled fist." She explained that, after Burton fumbled with his pocket, "[h]is hand gestures went from punching to a weird—this kind of hand," and made a motion which was described for the record as changing "from a regular fist to the—first couple of fingers kind of twisted over forward, and her wrist was tilted forward as if the person had an object in her hand."

[5] Deborah subsequently testified she may have been mistaken as to who was "jabbed," but at least one person was "jabbed and protected his chest."

restaurant employees, who appeared scared. She testified that Burton appeared to be the aggressor in the altercation and appeared to be escalating the situation.

Darlene, who was sitting with her back to the window, testified Deborah told her to "look," and she turned and saw two men. From their uniforms, they appeared to be employees of the restaurant next door. They were standing on the patio of the restaurant next door with their backs to the door, trying to push Burton away as he repeatedly came at them with his hands raised, punching. Darlene saw Burton move both his hands to his right side, feeling his pockets. One of the employees took out his phone, trying to make a call, while the other employee removed his belt. Then she saw Burton had a knife in his hand, stabbing at the employees. The man with the belt backed up while trying to move Burton back. Darlene testified the employees looked scared and she did not see them strike or beat Burton. Darlene also stated at first the employees were pushing Burton, but then they started punching back, "trying to protect themselves." Darlene saw the employee with the belt swing it at Burton, but she did not know if it struck him. Darlene said Burton stabbed toward the employees a few times without making contact. Then Burton stabbed the man with the belt, who crossed his arms over his chest. The two employees moved inside, and Burton turned around and "took off" down the street, pushing a basket.

Charles E. testified that he was homeless and a friend of Burton's. He often stayed near the restaurant's dumpster area and was familiar with Mohamed and Francisco from the restaurant. Charles witnessed the incident from the dumpster area. Burton was on the restaurant patio when he was approached by Mohamed and Francisco, who were "trying

to shoo him away." Burton did not leave. Mohamed and Francisco approached Burton, who backed up. Then Burton approached Mohamed and Francisco, who backed up. They went back and forth. Burton was not doing anything except trying to protect himself. Both parties started throwing punches at the same time. Charles did not see Burton take out his knife, but he saw Mohamed take off his belt and hit Burton with the buckle end of the belt, three times. One of the three hits was "a really good one." Charles testified that Mohamed asked Francisco to go inside, call the police and grab a knife. Francisco went inside. Then Burton approached Mohamed as Mohamed backed up, trying to protect himself, and Burton struck Mohamed. Charles did not realize Mohamed had been stabbed, as he never saw the knife, but he heard Mohamed gasp, like somebody had knocked his air out. Then Mohamed turned and ran inside.

Officers detained Burton in a nearby parking lot. Maricila and Francisco identified him as the man who had stabbed Mohamed. Officers searched Burton and the surrounding area, but they did not find the knife. Burton had a red mark on his right arm which an officer testified could be consistent with a defensive wound or being hit with a belt buckle, or from a handcuff. Otherwise, officers observed no fresh injuries on Burton.

Mohamed was transported by ambulance to the hospital. Upon arrival, he experienced cardiac arrest, but emergency room physicians were able to restore his heartbeat. Mohamed sustained a stab wound to the chest, resulting in a laceration to an artery and two lacerations to his lungs. He underwent surgery to repair these injuries, but he never regained full consciousness. The operating physician testified that, during Mohamed's cardiac arrest, "he probably sustained some anoxic brain injury," that is, lack

of oxygen to the brain, causing decreased cognitive ability. Although he responded to pain stimuli with twitching responses, he was otherwise nonresponsive and unable to speak. Mohamed remained in the hospital for two months before he was discharged to a skilled nursing facility for people who need extended neurological surveillance.

2. *Evidence Regarding Burton's Prior Altercations*

a. *August 19, 2013*

On August 19, 2013, officers were dispatched in response to a verbal disturbance at a liquor store. Responding officers saw Burton chasing after a Hispanic male. When officers asked Burton why he was chasing after the man, Burton said that "he felt disrespected the night before." Burton told officers he had argued with the man, identified as Mr. H., at a bus stop, then ran away and tripped and fell on a stick. Police attempted to speak to Mr. H. that night, but he was uncooperative. Officers "found a pair of scissors on Mr. [H.]"

b. *January 22, 2014*

On January 22, 2014, officers responding to a report of a fight in front of a retail store questioned Burton, who stated that he and a woman, W.W., were arguing in front of the store. When she turned to walk away from him, he pushed her, and she fell to the ground. W.W. told officers Burton punched her in the face three times. She did not have any visible injuries, but she seemed to be in pain.

c. *March 14, 2014*

Minesh H., who owns a business in the area and was familiar with Burton testified that, on March 14, 2014, he saw Burton banging a metal fence with a wooden two-by-four, approximately three to four feet long. Minesh left and returned later, when he saw another man, identified as J.S., approach Burton. Minesh recognized J.S. from the neighborhood too. Minesh saw Burton begin to strike J.S. over the head with the two-by-four. J.S. did "[a]bsolutely nothing" to Burton before the attack. Even after J.S. fell to the ground, Burton struck him again with "a couple of strokes." The man was bleeding. Minesh called the police.

d. *June 25, 2015*

On June 25, 2015, officers responded to reports of a subject with a knife at a bar and grill. When they questioned Burton, he told them he had been drinking at the bar with friends when someone accused him of taking a phone. Burton left, but a group of individuals followed or chased him, asking him to take out his phone. They argued back and forth until another individual explained that it was a misunderstanding and Burton did not have the phone. Burton went to his "residence or home," retrieved a two-foot metal blade with a duct tape handle, and returned to the bar and grill. Burton told officers that he brought the blade for protection, but also stated the individual who accused him "needed to get his ass whooped." In video footage of the incident, Burton appeared to argue with the individual, moving the blade around and pointing it at the person. Burton did not lunge at or strike the individual, and they ultimately went separate ways.

e. *June 7, 2016*

On June 7, 2016, David D., who owns and manages business properties in the area, testified that he discovered Burton had built a shelter on his property—for probably the third time in the span of two weeks. On the prior occasions, when David asked Burton to leave, Burton had complied. But on this date, when David asked Burton to leave, Burton became agitated, raised his voice, took his shirt off, and approached and pushed David, trying to intimidate him. Burton threw things and slammed his cart into the side of the building. David watched Burton yank and twist the doors of the property's dumpster, causing damage. David said Burton pulled up his shirt, making eye contact with him, and David saw he had a sharp object in his back pocket resembling a screwdriver. David called the police. The prosecution played the 911 call for the jury.[6]

After witnesses testified regarding these prior incidents of misconduct, the trial court instructed the jury that it could consider the evidence regarding the prior, uncharged incidents only for limited purposes, as follows:

> "The People presented evidence that the defendant committed other offenses and/or behavior that were not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses or acts.
>
> [¶] . . . [¶]

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6 During trial, the prosecution sought to introduce evidence regarding another incident in which it was alleged Burton stabbed another individual. The court declined to admit this evidence, citing Evidence Code section 352. The court found that the evidence would be excessive, and that the stabbing allegations were "substantially more serious" than the incidents the court had permitted to be introduced.

"If you decide that the defendant committed the following uncharged offenses or acts, you may, but are not required to, consider that evidence for the limited purposes stated for the particular offense or act.

"For the August 19, 2013, the offense or act involving [d]efendant Burton and [Mr. H.] for the limited purpose that [d]efendant Burton had a motive to commit the offense alleged in this case.

"For the January 22nd, 2014, involving the defendant Mr. Burton and [W.W.] You may use that only for the limited purpose that the defendant Mr. Burton had a motive to commit the offense alleged in this case.

"For the March [14], [2014], offense or act involving the defendant Mr. Burton and [J.S.], you may use that for the limited purpose that the defendant had a motive to commit the offenses alleged in this case, and the defendant acted with the intent to kill in this case.[7]

"In evaluating this evidence for this limited purpose, consider the similarity or lack of similarity between the uncharged offenses and acts and the charged offense.

"On June 25, 2015, the offense or act involving [d]efendant Burton at [the bar and grill]. The limited purpose is [d]efendant Burton had a motive to commit the offenses alleged in this case.

"The June [7], 2016, offense or act involving the defendant and [David D.] may be used for a limited purpose that the defendant Mr. Burton had a motive to commit the offenses alleged in this case. Do not conclude from this evidence the defendant has a bad character or is disposed to commit a crime.

"If you conclude that the defendant committed the uncharged offenses or acts, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the attempted murder or assault with a deadly weapon. The People must still prove each charge beyond a reasonable doubt." (See CALCRIM No. 375.)

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[7] Although the court previously ruled that the June 25, 2015 incident occurring at the bar and grill would be admitted for the additional purpose of establishing intent, the jury was instructed that the March 14, 2014 incident involving the two-by-four would be admitted for the additional purpose of establishing intent.

3. *Burton's Testimony*

Burton testified at trial, against the advice of his counsel. Burton stated that, at the time of the charged incident, he was homeless and stayed in the area around the restaurant. He kept his belongings in a black roller bag, which he carried in a shopping cart. He stopped in front of the retail store because it had a shaded area. He spread his belongings out because he was trying to fix a rip in his roller bag. When the police told him to leave, he was not upset or agitated. He gathered his belongings and headed to the restaurant patio, where there were umbrellas to provide shade. He went inside the restaurant and asked for a cup for water. He sat down outside on the patio to eat a can of tuna and some lemonade that he had in his bag. An acquaintance approached him, and Burton gave him some money, asking him to go to a nearby liquor store and buy him a half pint of vodka and some cigarettes. The person returned with those items, which Burton put in his bag in the cart. He sat at the table for less than two hours.

Mohamed came out of the restaurant and told Burton he had to leave. Mohamed's tone of voice was angry and rude, and Mohamed sounded agitated. Burton stood up and said, "what's the problem? I'm just eating." Mohamed stood by the doors and stared at him. Burton "kind of sigh[ed]" and said, "man, give me a minute" because he was tired. At that point, Mohamed took off his belt. As soon as Mohamed took off his belt, Francisco came outside and angrily yelled, "Get the fuck out of here." Burton felt scared and thought the men "were going to jump [him]," so he said, "[H]ell no. You all not

going to jump me," and he pulled out his knife, which was in his back, right pocket.[8] He held the knife open, in his right hand, pointing it to the ground. The two employees were about eight feet away, standing by the door. Burton moved toward his shopping cart to leave, but to do so, he had to walk toward the men. He walked straight toward them. Once he passed Mohamed, Mohamed started hitting him hard in the back with the belt buckle. This caught Burton by surprise. Burton testified, "After he hits me the first time, he hits me again, and I throw my hand up. I turned around." Burton covered his head and face with his arms as Mohamed continued to hit him on the head, shoulder, and arms. After he was struck the second time, Burton swung his arm across his body, trying to make Mohamed "back up from hitting [him]." Burton did not know he struck Mohamed with the knife. Mohamed told Francisco to go get him a knife, and they went inside. Burton collected his things and left, afraid they would return. He went to a store nearby to purchase a lighter so he could have a cigarette, but the store did not sell lighters. He accidentally left his vodka and cigarettes on the counter at the store because he was upset and stressed from the incident. He was apprehended by police outside the store.

Burton also testified regarding the allegations of prior misconduct. He testified as follows:

On August 19, 2013, he was running after Mr. H. because Mr. H. had stabbed him the night before. When Burton previously told police he had fallen, it was not the truth.

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8 Burton described the knife as "a black pocket knife, maybe three inches long." He testified he used the knife to cut his food and for protection.

On January 22, 2014, Burton and W.W. had an argument. She started going through his backpack, threw his stuff out, and stole his Walkman. "[O]ne thing led to another." She hit him and then walked away, at which point he pushed her, and she fell. She was taken to the hospital.

On March 14, 2014, Burton was minding his own business when J.S., who was 15 or 20 years younger than Burton, approached him and antagonized him, calling him names and spitting on him.[9] Burton went and got the two-by-four and hit him with it.

On June 25, 2015, Burton was at a bar and grill when a "youngster" accused him of stealing another youngster's phone. Burton left the bar, but the youngsters followed him, and ran up to him. Burton was afraid they were going to "jump" him, but someone else came out of the bar and said Burton did not steal the phone; someone else had it. Burton went to the "spot" where he sleeps, got a machete-like blade from his belongings, and returned to the bar with it for protection. He did not swing the blade or hit anyone with it.

On June 7, 2016, Burton was sleeping on the walkway of an office park when the property owner, David D., arrived and told him to leave. They got in a heated argument, and Burton gathered his things and walked away but David followed him about a quarter of a mile. Burton had a screwdriver, but he did not pull it out or lift his shirt. At one point, Burton stopped and walked back and called David a "punk snitch."

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[9] When questioning Burton, his defense counsel erroneously identified the dates of the two-by-four and bar and grill incidents. To avoid confusion, we use the correct dates identified elsewhere in the record.

4. *Prosecution's Rebuttal Evidence and Cross-examination of Burton*

In rebuttal, the prosecution played the recording of a police interview conducted after Burton's arrest. During the interview, Burton initially denied getting in a fight but then admitted he had an argument. He did not mention being hit with a belt or a stabbing. He stated that he had put the knife into his bag after the incident and that things had been stolen from his bag.

The prosecution also played the recording of a second interview conducted that day. After being read his *Miranda* rights, Burton acknowledged he had an argument when he was told to leave the restaurant and Mohamed hit him with a belt.[10] He admitted he stabbed Mohammed one time and then he left. He said Mohamed told the other employee to get a knife. He reiterated that he put the knife in the bag, but then, when asked where the knife was now, stated, "it's not in the bag." Burton complained that he "had been disrespected for so long" and recounted the incident at the bar and grill. He stated he had just purchased the knife a few days prior "in case [he] need[ed] it[,] and this is maybe one of the times that [he] needed it . . . 'cause [Mohamed] was beatin' on [him]." He admitted to drinking one beer earlier that day, in front of the liquor store, and then another one on the restaurant patio. He stated, "It's not stabbin', it was self-defense."

On cross-examination, Burton further testified that he responds to conflict by "walk[ing] away from it." When asked if his response was to "calmly walk away" during the prior incidents, he stated, "Yeah. I walk away, yes." He denied having an anger

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10 *Miranda v. Arizona* (l966) 384 U.S. 436.

problem, instead stating: "I don't have any anger problem. When I get angry, meaning at another person, I talk to myself and tell myself to settle down." Burton then proceeded to characterize his response to the prior incidents in a similar manner.

> "Q. And you calmed yourself down on that day when you returned with your machete; that was you calming yourself down.
>
> "A. Yes.
>
> "Q. The day when you pushed [W.W.] from the back when she was trying to walk away, you were calming yourself down?
>
> "A. If you want to say that, yes.
>
> "Q. On the day when you walked up to Mr. [D.], pushed him and called him a snitch, you were trying to calm yourself down?
>
> "A. I did not push him. [¶] . . . [¶] You can hear me on the phone telling him, I didn't push you. Hollering.
>
> "Q. When you were beating a man who was on the floor bleeding from his ear, bleeding from his mouth, with a 2x4, strike after strike after strike, that was your way of calming yourself down, right?
>
> "A. No, it's not my way of calming myself down.
>
> "Q. That's right. You talk to yourself to calm down; that's what you do, right?
>
> "A. Yeah. I talk to myself, yes."

Further, Burton testified that in each of the prior incidents, he had no problems respecting people's boundaries. He also explained that, on the date of the charged offense, he was carrying the knife for "protection" and that he was scared because he has been jumped before by business owners, "[p]eople, young kids, everybody, because I'm

homeless." He testified that he did not know how hard the knife was pushed into the victim, stating "I have no idea. All I did was swing it across my body."[11]

5. *Jury Instructions and Closing Arguments*

At the close of evidence, the jury was instructed that the evidence regarding the prior, uncharged incidents could be considered only if the prosecution had established by a preponderance of the evidence that those incidents had occurred. The jury was further instructed it could consider these incidents only for the limited purpose of determining motive, and for the March 14, 2014 incident only (when Burton hit a victim with a two-by-four), for purposes of determining motive and intent. The jury was instructed they could also consider the evidence to evaluate Burton's credibility.

In closing, the prosecution stated, "So let's talk about, did the defendant have the intent to kill? Did he have the motive to kill? This man retaliates every time he feels disrespected. Remember all these incidents we talked about . . . ." The prosecutor reiterated the facts surrounding the five prior incidents and then stated, "This is not a man who simply walks away when he feels assaulted. [¶] . . . This is a man who, when he feels disrespected, feels the need to retaliate."

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11 Before Burton testified, the trial court confirmed it was allowing the prosecution to cross-examine the defendant regarding his underlying conduct, both as to the section 1101(b) prior acts and the additional offenses admitted for impeachment. As noted *ante*, the court admitted eight incidents for purposes of impeachment. Other than the two-by-four incident and the bar fight incident (which were also admitted under section 1101(b)), however, the details of defendant's other convictions were not elicited at trial. Burton admitted some, but not all, of these prior convictions, stating that he did not remember certain offenses and "tr[ies] not to" remember them.

During deliberations, the jury made several requests, including requests "to have read [back] all [four] witness testimonies" and "to have read to us the portion of '[all]' testimony which pertains to the knife." However, they reached a verdict before the read-back occurred, stating "the only [witness read-back] we wanted was [Burton], and we don't want him now."

D. *Conviction and Sentencing*

The jury convicted Burton of attempted voluntary manslaughter as a lesser included offense of count 1 and found true the allegations related to count 1 that he personally used a knife and personally caused great bodily injury. The jury convicted Burton of count 2 as charged and found true the allegation he personally caused great bodily injury. In a bifurcated court trial, the trial court found true the prior conviction allegations.

The trial court sentenced Burton to prison for a total term of 14 years, six months, and imposed but stayed a sentence on count 2 of three years plus a five-year term for the great bodily injury enhancement. (§ 654.)

DISCUSSION

Burton contends the admission of evidence relating to his five prior uncharged offenses violated section 1101(b). He argues that the evidence, although ostensibly used to establish motive or intent, was merely evidence of his propensity for violence. He further argues that, in any event, the evidence was not probative of his motive and intent because of significant factual dissimilarities between the prior uncharged conduct and the

instant offense. Finally, Burton argues that the evidence was unduly prejudicial and therefore independently excludable under Evidence Code section 352.

The Attorney General contends the uncharged conduct was relevant to show Burton's motive and intent to kill, by showing he "retaliated violently for perceived disrespect"; the probative value of the evidence was not outweighed by its prejudicial effect; and even if the evidence was admitted in error, it was harmless.

We conclude evidence of one prior incident was properly admitted under section 1101(b)—the incident when Burton brandished a screwdriver, destroyed property, and pushed the property owner who asked him to leave the premises—and admission of the remaining incidents was harmless error.

A. *Applicable Law*

Evidence of other crimes or bad acts is inadmissible when offered to show that a defendant had the criminal disposition or propensity to commit the crime charged. (Evid. Code, § 1101, subd. (a).) Section 1101(b) "clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, fn. omitted (*Ewoldt*).) Section 1101(b) provides that "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." In addition, Evidence Code section 1101, subdivision (c) provides that "[n]othing in this section

affects the admissibility of evidence offered to support or attack the credibility of a witness."

"When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, '[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' " (*Thompson*, *supra*, 1 Cal.5th at p. 1114.)

"Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*Ewoldt*, *supra,* 7 Cal.4th at p. 402.) To be admissible to prove intent, the uncharged misconduct need only be "sufficiently similar [to the charged offense] to support the inference that the defendant ' "probably harbor[ed] the same [or similar] intent in each instance." ' " (*Ibid*.) When introduced to prove motive, there must be a "nexus or direct link . . . between the prior [misconduct] and the charged offense." (*People v. Walker* (2006) 139 Cal.App.4th 782, 804 (*Walker*); see also *Thompson*, *supra*, 1 Cal.5th at p. 1115 [" 'The existence of a motive requires a nexus between the prior crime and the current one.' "].)

If the court determines the evidence is relevant and admissible under section 1101(b), the court must next determine whether the probative value of the evidence is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (*Ewoldt, supra,* 7 Cal.4th at p. 404; Evid. Code, § 352.) " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Karis* (1988) 46 Cal.3d 612, 638 (*Karis*).)

On appeal, we review the trial court's ruling under Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668.) We do not disturb the trial court's exercise of discretion except upon a showing that it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

B. *Analysis*

The trial court examined the circumstances of the proffered uncharged offenses and concluded that each of the five incidents had the requisite "nexus" to the charged offense to support a rational inference as to motive, and, for one incident, sufficient similarity to justify consideration for purposes of intent as well. The trial court further determined that the probative value of these uncharged crimes was not substantially outweighed by the danger of undue prejudice. We conclude the trial court properly

admitted evidence of one prior incident on the issue of motive, and it was harmless error to admit the remaining other-crimes evidence on the issue of motive.

1. *Section 1101(b) Evidence to Establish Motive*

Evidence Code section 1101 bars admission of evidence of prior acts of misconduct if " 'offered to prove . . . criminal disposition' " but not if " 'offered to prove a material disputed issue such as motive or intent.' " (*People v. King* (2010) 183 Cal.App.4th 1281, 1300.) All five prior acts of misconduct were admitted to show Burton's motive for committing the instant crime. We therefore consider whether evidence of those prior acts was probative on the material disputed issue of motive for attempting to kill the victim here. (See *People v. Thompson* (1980) 27 Cal.3d 303, 315 [a fact is "material" if it is "actually in dispute"].)

To satisfy the materiality requirement, the fact sought to be proved or disproved must either be an ultimate fact in the proceeding or an intermediate fact from which such ultimate fact may be inferred. (*People v. Thompson, supra,* 27 Cal.3d at p. 315.) Elements of the offense and defenses are ultimate facts (*id*. at p. 315, fn. 13), whereas motive is an intermediate fact (*id*. at p. 315, fn. 14). In the present case, a disputed ultimate fact was whether Burton intentionally stabbed the victim, intending to kill him, or whether the victim's stabbing was justified by self-defense. If the prosecution proved Burton had a motive to kill the victim, that intermediate fact would tend to prove the stabbing was intentional and not a result of Burton acting in self-defense. We therefore conclude that the requirement of materiality was met with respect to the issue of motive.

We next consider whether evidence relating to Burton's prior uncharged acts tended to prove Burton had a motive to intentionally stab the victim here. Burton contends the prior acts and the instant offense are too dissimilar, noting they occurred "at an entirely different time, and in entirely different circumstances," and that "retribution or revenge normally presupposes an act taken against a specific other individual based upon a specific prior act committed by that individual." (Underlining omitted.) But such differences are not dispositive. "[T]he probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15 (*Demetrulias*).)

We conclude a sufficient nexus exists to support admission of evidence relating to the June 2016 incident where Burton brandished a sharp 12- to 14-inch screwdriver, destroyed property, and pushed the property owner who asked him to leave the premises. This evidence supports the reasonable inference that Burton demonstrated the same animus and hostility toward a property owner who asked him to leave the premises, and reacted in a violent, aggressive, and retaliatory manner. He was armed with a weapon capable of causing great bodily injury and used it to threaten and intimidate the victim. Similarly, in the crime charged here, the evidence supports the reasonable inference that Burton responded with hostility and animus when Mohamed told him to leave the restaurant, and deliberately used the knife to intimidate and then ultimately stab the victim. Burton also tried to minimize his actions in the prior incident, as he did in the present case. He admitted that he had a weapon during the June 2016 incident, but he

denied ever brandishing it (never explaining how the victim could have seen the weapon without Burton using it in a threatening manner). Burton also denied pushing the victim, admitting only to calling him a "punk snitch"—just as he initially denied being involved in any altercation during the instant offense, before he admitted the stabbing and then claimed it was in self-defense. We therefore conclude the trial court properly exercised its broad discretion in finding this incident was probative of Burton's motive in stabbing the victim during the charged crime.[12]

We further conclude the trial court properly exercised its discretion in finding the probative value of this evidence was not substantially outweighed by the danger of undue prejudice. (Evid. Code, § 352.) The trial testimony describing this incident was rather brief and was "no stronger or more inflammatory than the testimony concerning the charged offense" (*People v. Tran* (2011) 51 Cal.4th 1040, 1047), where Burton stabbed Mohamed, puncturing his lung and causing him to eventually lose consciousness and remain in a coma. The court's limiting instruction—admonishing the jury not to "conclude from this evidence the defendant has a bad character or is disposed to commit a crime"—further minimized any potential prejudice to Burton. (*People v. Rogers* (2013)

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12 We reject Burton's claim that the circumstances were too dissimilar to support admission of the prior incident because, in the instant offense, he allegedly was being threatened with physical force by the victim. Whether Mohamed was threatening Burton with his belt was disputed both when the court made its pretrial ruling and at trial. Burton's characterization of the evidence may be consistent with Burton's description of the events that day and with portions of Charles's testimony. However, it was contradicted by other witnesses, including Deborah and Darlene, who testified that Burton was the aggressor and the victim was using the belt defensively. Neither the trial court nor the jury were required to accept Burton's view of the evidence. Indeed, it is this factual dispute that underscores the relevance and materiality of the prior act evidence.

57 Cal.4th 296, 331-332; *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 755 [rejecting appellant's prejudice argument where limiting instruction precluded jurors from using prior crimes evidence to show propensity to commit charged offense].) We presume the jury understood and followed the instruction. (*People v. Cage* (2015) 62 Cal.4th 256, 275.) Finally, the fact that this prior incident was probative of Burton's motive in stabbing the victim does not mean the evidence was likely to cause "undue prejudice" within the meaning of Evidence Code section 352. (See *Karis, supra*, 46 Cal.3d at p. 638.)

Although we conclude the incident involving the other property owner is probative of Burton's motive in this case, we reach a different result as to the remaining four prior incidents. Burton contends "retribution or revenge normally presupposes" acts taken against the same victim involved in the prior and the instant offense. Admission of motive evidence is not limited to acts taken against the same victim,[13] but we agree the case law does not support the expansive approach adopted by the trial court here. The court's opinion in *Walker, supra*, 139 Cal.App.4th 782 is instructive. There, the defendant was charged with murdering a prostitute. The court held that evidence of prior sexual assaults against other prostitutes was admissible as tending to show the

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13 "Other crimes evidence is admissible to establish two different types or categories of motive evidence. In the first category, 'the uncharged act supplies the motive for the charged crime; the uncharged act is cause, the charged crime is effect.' [Citation.] 'In the second category, the uncharged act evidences the existence of a motive, but the act does not supply the motive. . . . [T]he motive is the cause, and both the charged and uncharged acts are effects. *Both crimes are explainable as a result of the same motive*.' " (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381 (*Spector*).) The present case involves the second category of evidence.

defendant's " 'common motive of animus against prostitutes resulting in violent batteries interrupting completion of the sex act,' " but evidence of his prior sexual assault of a non-prostitute was not admissible. (*Id*. at pp. 803-805.) Similarly, here, evidence of Burton's prior attack on a property owner was sufficiently probative of his motive in stabbing Mohamed, but evidence regarding his violent confrontations with others was not.

In other cases where courts have admitted evidence of prior crimes involving different victims, there was some other direct factual nexus or common features linking the two crimes. (See *People v. Davis* (2009) 46 Cal.4th 539, 604 [evidence of two prior sexual assaults tended to show defendant had motive for sexually assaulting murder victim]; *Demetrulias, supra,* 39 Cal.4th at p. 15 [prior assault and robbery against elderly man earlier the same evening as instant offense tended to show that defendant stabbed elderly victim to take his money rather than to defend himself]; *Spector, supra,* 194 Cal.App.4th at pp. 1377, 1384-1385 [defendant was charged with murder of woman who returned to his home after a night of drinking; evidence that defendant previously assaulted multiple other women at gunpoint under similar circumstances was admissible to refute his defense that victim shot herself and to prove motive]; *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 375 [evidence defendant had previously shot at person he thought was Yugoslavian ambassador tended to show defendant's hatred of Yugoslav government; evidence was admissible in defendant's trial for murdering Yugoslav government official]; *People v. Zankich* (1961) 189 Cal.App.2d 54, 66 [defendant's commission of unprovoked assaults on two strangers within hours of the charged crime

admissible "as tending to prove lack of provocation for the assault" on the murder victim].)

The four incidents we find inadmissible here lack the requisite nexus. Labeling the prior incidents as common acts of retaliation in response to feeling disrespected is not sufficient. Without more, a "defendant's tendency toward violence when confronted . . . is not a proper reason for admission" under section 1101(b). (*People v. Williams* (2018) 23 Cal.App.5th 396, 421 [evidence of defendant's 23-year-old conviction for shooting with intent to kill his former mother-in-law was not properly admitted to show that defendant killed his current wife with premeditation and deliberation].) Because evidence of the four prior acts not involving the same type of victim (i.e., another property owner) served no purpose other than to show defendant's propensity for violence, we conclude the trial court abused its discretion in admitting this evidence.

2. *Harmless Error Analysis*

The erroneous admission of other-crimes evidence is reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Malone* (1988) 47 Cal.3d 1, 22 (*Malone*).) We do not overturn the trial court's judgment unless Burton shows "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Watson*, at p. 836.) Burton cannot make this showing.

Much of the evidence would arguably have been admitted in any event to refute Burton's claim of self-defense and his testimony at trial. (Evid. Code, § 1101, subd. (c).) While "[s]ection 1101 limits the admission of prior misconduct to prove conduct on a particular occasion, . . . it does not 'affect[] the admissibility of evidence offered to

support or attack the credibility of a witness.' " (*People v. Turner* (2017) 13 Cal.App.5th 397, 408; see *People v. Carpenter* (1999) 21 Cal.4th 1016, 1056 [" 'No witness including a defendant who elects to testify in his own behalf [is] entitled to a false aura of veracity.' "].) Several of the prior incidents supported the inference that Burton was not acting in self-defense when he fought with the victim and stabbed him. (*People v. Vidaurri* (1980) 103 Cal.App.3d 450, 457-459 [trial court properly admitted evidence of prior robbery in which defendant threatened security guards with a knife "to rebut defendant's contention [as to present crime] that he drew his knife only in self-defense"].) Much of the evidence was also relevant to prove that Burton stabbed the victim intentionally, rather than accidentally, and to refute his claim that he only had the knife because he was fearful based on prior alleged incidents when he was "jumped" by business owners. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 204 ["[W]hen a defendant admits committing an act but denies the necessary intent for the charged crime because of mistake or accident, other-crimes evidence is admissible to show absence of accident."]; see *People v. Terry* (1970) 2 Cal.3d 362, 396 ["[P]roof of involvement in prior crimes is admissible if it tends ' "to overcome any material matter sought to be proved by the defense" ' [Citation], and, in particular, to rebut a defense that a criminal act was done out of 'honest fear' [Citation]."], disapproved on other grounds in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) Finally, the evidence was properly used to refute Burton's claim that he responds to confrontations or conflicts in a calm manner by walking away, that he has no anger issues, and that he has no difficulty respecting people's boundaries. (See *Andrews v. City and County of S.F.* (1988) 205 Cal.App.3d

938, 946 ["[A] witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony."].) Because much of the evidence of other crimes was properly before the jury irrespective of whether it was admissible to show motive under section 1101(b), Burton cannot meet his burden of showing prejudicial error.

Even assuming admission of all the prior crimes evidence was error, however, it is not reasonably probable the jury would have reached a more favorable result. The remaining evidence regarding Burton's guilt was strong. Darlene and Deborah—the only two witnesses who were not involved in the altercation and did not know either the victim or the defendant—both testified Burton was the aggressor. They both observed the stabbing, although only Darlene saw the knife. Deborah testified that Burton was agitated and was the aggressor who escalated the situation. Darlene similarly testified that Burton kept "coming and coming" at the employees, first punching and then stabbing, as the employees were trying to push him away. Both testified that Mohamed removed his belt while Burton was pulling out his knife (or fumbling for his back pocket, as Deborah testified), and Burton stabbed (or "jabbed") Mohamed as Mohamed was backing away from him. Burton never tried to leave until after he stabbed Mohamed. Even the witness most favorable to the defense, Charles, corroborated this testimony. Charles explained Mohamed and Francisco were trying to get Burton to leave by "shooing" him away, but Burton was not complying with their requests to leave. Both Mohamed and Burton got "physical," like "slap fighting." Charles did not see the knife,

so he did not know at what point the weapon was drawn, but Charles did see Mohamed retrieve his belt and hit Burton with it three times. Consistent with the testimony of other witnesses, however, Charles explained that the stabbing occurred while Mohamed was "going back trying to protect himself" and moving backward. Burton was also impeached with numerous prior convictions, independent of the section 1101(b) evidence, himself agreeing that "all of these actions are actions of a dishonest man."[14]

We thus conclude that, even if the disputed prior crimes evidence had been excluded, there is no reasonable probability Burton would have received a more favorable trial outcome. (*Malone, supra,* 47 Cal.3d at p. 22 [no prejudice despite

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14 As discussed *ante*, the trial court and the parties separately addressed the use of impeachment evidence and section 1101(b) evidence. At a minimum, the conduct underlying Burton's felony conviction for the two-by-four incident was independently admissible as a crime of moral turpitude. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 296 ["the admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude"]; *People v. Gutierrez* (2018) 28 Cal.App.5th 85, 89 [rule allowing admission of past misconduct "includes the misconduct underlying a prior misdemeanor conviction" and also applies to "the conduct underlying a felony conviction"]; *People v. Cavazos* (1985) 172 Cal.App.3d 589, 595 [assault with a deadly weapon involves moral turpitude].) On appeal, Burton did not challenge the trial court's rulings regarding impeachment evidence, so any claim of error is forfeited. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1218-1219.)

assumed error in admission of prior act evidence in light of the overwhelming evidence of defendant's guilt].)[15]

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

DATO, J.

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15 Burton notes the jury requested a read-back of " '[all]' testimony which pertains to the knife," which "indicates its focus on that issue, while its acquittal of appellant of the more serious charge of attempted murder illustrates that it did not accept the prosecutor's argument that appellant intended to kill [the victim]." He further argues the verdict on the lesser included offense, rather than the offense as charged, indicates reasonable probability the jury would have reached a different result in the absence of the prior misconduct evidence. We disagree that it was reasonably probable the jury would have reached a different result without the prior misconduct evidence. The jury's verdicts instead demonstrate that it considered the evidence without being unduly influenced by defendant's prior crimes.